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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-244

GARY W. BOOZE, and JOHN W. GANTZER
Petitioners,

v.

THE STATE OF FLORIDA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND DISTRICT OF THE STATE OF FLORIDA

Guillermo A. Ruiz and
Philip J. Padovano, of
RUIZ and PADOVANO
2950 First Avenue North
St. Petersburg, Florida
Counsel for Petitioners

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No.

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Petitioners, Gary W. Booze and John W. Gantzer, respectfully pray that a Writ of Certiorari issue to review the judgments of the District Court of Appeal for the Second District of the State of Florida in these cases. The opinion of the District Court of Appeal in *State of Florida v Booze* is reported at 291 So. 2d. 262 and is appended hereto (A-7). The opinion of the District Court of Appeal in *State of Florida v Gantzer* is reported at 293 So. 2d. 107 and is appended hereto (A-15).

JURISDICTION

The District Court of Appeal entered its judgment in *State of Florida v Booze* on March 8, 1974 (A-7) and a hehearing was denied on April 3, 1974, (A-10). The District Court of Appeal entered its judgment in *State of Florida v Gantzer* on March 20, 1974 (A-15) and rehearing was denied on May 2, 1974 (A-16). The Supreme Court of Florida denied Certiorari in both cases on July 12, 1974 (A-11, 17). Jurisdiction of this Court is invoked under 28 U. S. C. A. 1257 (3).

QUESTION PRESENTED

Whether the Fourth Amendment requirement that a search warrant particularly describe the place or places to be searched and the property to be seized is satisfied by a search warrant which contains no description whatever of the place to be searched or the property to be seized but which does incorporate by reference an attached affidavit for search warrant containing a description of the place to be searched and the property to be seized.

CONSTITUTIONAL PROVISION INVOLVED

U. S. CONST. AMEND. IV, the pertinent portions of which are emphasized in italics here, reads in its entirety as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and *no warrants shall issue, but upon probable cause,* supported by oath or affirmation, *and particularly describing the place to be searched,* and the persons or things to be seized."

STATEMENT OF THE CASE

On April 5, 1973, the residence of petitioner, Gary W. Booze, was searched under the authority of a search warrant (A-1). This warrant contained no description at all of petitioner's residence nor did it command the seizure of any specific items. The warrant did, however, incorporate by reference the Affidavit for Search Warrant (A-2), which was stapled to the back of the Warrant. The affidavit (A-2) executed by a local law enforcement officer, contained a description of petitioner's residence as well as a description of contraband articles believed to be located in the residence. The search of the residence resulted in the seizure of marijuana and other contraband items and petitioner was charged with six violations of State Law.

The Federal Constitutional issue was first raised in the Trial Court. A Motion to Quash the warrant and suppress the evidence was filed on the ground that the warrant was insufficient on its face because of its failure to comply with the requirements of the Fourth Amendment. The Trial Court denied the Motion.

Petitioner entered a plea of nolo contendere, and was sentenced to a term of incarceration, upon an adjudication of guilt by the Court. He appealed to the District Court assigning as error the ruling of the lower court that the warrant was constitutionally sufficient.

The District Court affirmed the judgment and rendered an opinion (A-7) holding that a search warrant with no description of the place to be searched or items to be seized can be validated by an affidavit containing the

description of the premises and the property to be seized if the affidavit is incorporated by reference in and attached to the warrant. The basis of the decision is that a police officer armed with this type of warrant and affidavit could go unerringly to the right house and seize the right property (A-8).

The decision of the District Court of Appeals specifically referring to and interpreting the Fourth Amendment became final in Florida on July 12, 1974 when the Florida Supreme Court denied Certiorari (A-11).

A statement of the case as it pertains to petitioner, John W. Gantzer, is omitted here since the warrant (A-12), affidavit (A-13), judgment of the District Court of Appeal (A-15), and judgment of the Florida Supreme Court (A-17) are in all respects the same as those presented in petitioner, Booze's case.

REASONS FOR GRANTING THE WRIT

I

THE FLORIDA COURT HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE IN SUCH A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT

This Court has never decided the precise question of whether a search warrant with no description can be cured by an affidavit containing the description where the affidavit is attached to the warrant and referred to in the warrant. The opinion of the District Court of Appeals herein sought to be reviewed answered the question

affirmatively and petitioners submit its judgment is probably not in accord with prior decisions of this Court.

The decision of the District Court is predicated on the assumption that this warrant is validated by the affidavit because it embraces all of the terms contained in the affidavit. The affidavit does not legalize the warrant by supplying missing information; however, actually the reverse is true. These warrants when read alone justify the search of any residence in the County and when stapled to the front of an affidavit prepared by a policeman, give him authority to execute what is in effect his own affidavit.

The procedure now sanctioned in Florida by virtue of these cases allows the affidavit to become the controlling document and the role of the magistrate is simply to perform the perfunctory task of signing a form to be affixed to the affidavit. Petitioners submit this procedure is not consistent with the holding of this Court in *Coolidge v New Hampshire* 403 U. S. 443 (1971), that a search warrant should be issued by a neutral and detached magistrate.

Petitioners are cognizant of the observation of this Court in *United States v Ventresca* 380 U. S. 102 (1965), that the commands of the Fourth Amendment, like all constitutional requirements, are practical and not abstract, but submit that the issue herein presented does not raise an abstract or hypertechnical analysis of a search warrant problem. The warrants in these cases do not present technical violations of the Fourth Amendment any more than the search of a residence without a warrant would be a technical violation or a harmless error on the ground that the search actually produced a seizure of contraband

items.

The holding of the District Court below, that the affidavit alone may contain the description, is contrary to the wording of the Fourth Amendment which provides in part:

> ". . . *no warrant shall issue, but upon probable cause,* supported by oath or affirmation. *and par-particularly describing the place to be searched* and the persons or things to be seized . . ." (Emphasis supplied)

This wording indicates that the description should be contained in the warrant. Petitioners submit the decision of the District Court is not in accord with prior rulings of this Court because in the area of particularity of search warrant descriptions the Court has taken a literal view of the Amendment, see *Stanford v Texas* 379 U. S. 476 (1965). Mr. Justice Stewart in that case in passing upon the words "particularly describing" contained in the Fourth Amendment, said at 481, "These words are precise and clear." Because the District Court in the instant cases failed to apply the precise and clear meaning intended by the Amendment, its decision is probably contrary to the views of this Court on this particular subject.

In *Aguilar v Texas* 378 U. S. 108 (1964), Mr. Justice Goldberg warned at 111:

> ". . . Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform his "neutral and detached"

function and not serve merely as a rubber stamp for the police . . ."

While *Aguilar* dealt with the sufficiency of probable cause allegations made to the magistrate and the instant case deals with the sufficiency of the description in the warrant, it is clear that the principle is applicable, and that the search warrant procedure now sanctioned in Florida by virtue of the cases presented herein, contains the same evil warned against by Mr. Justice Goldberg, ie., that policemen will control the issuance of search warrants.

II

THE DISTRICT COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The issue of incorporating by reference descriptions contained in the affidavit for search warrant, to cure defective descriptions in the warrant itself, and in some cases, such as the ones presented here to provide missing descriptions in the warrant, has become an important problem in the administration of American Criminal Justice. The decisions of the various states are not in agreement and a decision of this Court is necessary if the provisions of the Fourth Amendment are to be applied uniformly throughout the country.

The Supreme Court of Massachusetts recently held that a search warrant with a defective description can be cured

if it makes reference to the affidavit containing an adequate description even if the affidavit is not attached to, or incorporated in the warrant. *Commonwealth of Massachusetts v Wealth* 294 N. E. 2d. 860 (Mass. 1973), but an Arizona Court in the same year held the affidavit must be physically attached to the warrant in order to cure its defect, *State of Arizona v Drago* 509 P. 2d. 1051 (Ct. App. Ariz. 1973).

The rule in Texas holds that where the affidavit is attached to the warrant it may be used to aid the description found in the warrant, *Phenix v State of Texas* 488 S. W. 2d. 759 (Ct. App. Tex. 1973), and a similar rule can be found in the State of Maryland, see *Hignut v State of Maryland* 17 Md. App. 399, 303 A. 2d. 173 (Ct. App. Md. 1973). This version of the rule assumes that some description, however defective, already exists in the warrant itself. The Supreme Court of Michigan, however, has held that if the affidavit is incorporated and attached, no description is required in the warrant at all, *People of Michigan v Raines* 203 N. W. 77 (Mich. 1925).

Finally, the State of Illinois, in a case which is admittedly distinguishable on the facts, takes a dim view of the whole idea of incorporating search warrant descriptions by reference, see *People of Illinois v Staes* 235 N. E. 2d. 882 (App. Ct. Ill. 1968).

The question of the reasonablesness of a particular search must be determined on a case by case basis, and the question of probable cause is in many respects a factual question which must be determined with reference to each case, but petitioners suggest that the issue here requires

a determination by this Court, and a uniform application of that decision by the States. The question of whether a search warrant with no description of the place to be searched can be cured by an affidavit containing the description, incorporated by and attached to the warrant is a legal question. It is either constitutionally permissible under the Fourth Amendment, or it is not. It can not be applied one way in one state and another way in another state without violating the principle that the Fourth Amendment applies to the States.

Petitioners therefore respectfully submit that a decision and opinion of this Court would have an effect reaching far beyond its consequences to the immediate parties in the action.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,
Guillermo A. Ruiz and
Philip J. Padovano, of
RUIZ and PADOVANO
2950 First Avenue North
St. Petersburg, Florida
Counsel for Petitioners